Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

COMMENTS OF THE CITY OF NEW YORK

I. INTRODUCTION AND BACKGROUND

The City of New York ("City"), hereby submits the following comments in response to the Notice of Proposed Rulemaking released by the Federal Communications Commission ("Commission") in the above captioned proceeding.[1] The City looks forward to greater competition in the multichannel video programming distributor ("MVPD") market. Like most municipalities, the City also seeks to ensure that attempts to speed entry into the MVPD market do not diminish the City's existing authority to address those primarily local issues that are associated with the provision of multichannel video programming.

The following comments respond to the Commission's questions about why municipalities need a process to address local concerns prior to new MVPDs providing

service. The comments describe those aspects of the cable franchising process that necessitate local involvement, and urge the Commission to ensure that municipalities retain their authority over these uniquely local matters.[2] The City has also considered at some length how to expedite entry into the MVPD market, and proposes below a scheme for addressing the concerns raised by certain potential new entrants, while still enabling local governments to address their legitimate municipal needs.

Since 1970, the City has been entering into franchise agreements with cable operators. Today, the City has nine cable franchise agreements that together cover the entire city, and one open video system agreement. The franchise agreements are with Time Warner Cable of New York City ("Time Warner) and Cablevision Systems New York City Corporation ("Cablevision"),[3] and the open video system agreement is with RCN Telecom Services of New York, Inc. ("RCN"), with RCN operating as an over builder.[4] Although Verizon has not formally applied for a franchise, it has been constructing fiber-optic facilities in certain parts of the City, which it has indicated will

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[1] *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, MB Docket No. 05-311, FCC 05-189 (rel. Nov 18, 2005) ("*NPRM*").

[2] *See Burns, Inouye Release Principles for Video Franchising Reform*, Press Release (rel. Feb. 2, 2005) (stating that "[c]onsistent with existing law, state or local franchise authorities should retain the authority to supervise rights-of-way use and recover the associated costs, to require the payment of a reasonable franchise fee, and to require sufficient outlets for local expression and appropriate institutional network obligations.").

[3] In these comments, the City will cite to either the Time Warner Southern Manhattan franchise agreement, Cable Television Franchise Agreement for the Borough of Manhattan (Southern Manhattan Franchise) Between The City of New York and Time Warner Cable of New York City, a division of Time Warner Entertainment Company, L.P., (entered into Sept. 16, 1998) ("Time Warner Agreement"), or the Cablevision franchise agreement for Brooklyn, Cable Television Franchise Agreement for the Borough of Brooklyn Between The City of New York and Cablevision Systems New York City Corporation (entered into Oct. 8, 1998) ("Cablevision Agreement"). The pertinent language in all of the agreements is virtually identical. Parties can obtain copies of the agreements by contacting the Department of Information Technology and Telecommunications at 212-788-6119.

be compatible with (among other things) the provision of cable television service when completed.[5] The City anticipates that Verizon will soon seek one or more cable television franchises within the City.[6]

II. CABLE TELEVISION FRANCHISING AND OTHER AUHTORIZATIONS

The Commission states in the *NPRM* that "it is not clear how the primary justification for a cable franchise – *i.e.*, the locality's need to regulate and receive compensation for the use of public rights of way – applies to entities that already have franchises that authorize their use of those rights of way."[7] The City has two important concerns with this statement. First, this statement fails to fully reflect that the federal Cable Act does not limit the authority of franchising authorities to only right-of-way based issues. Indeed the Cable Act clearly contemplates that franchising entities will have authority over a wide range of matters such as consumer service,[8] programming for public, educational and governmental ("PEG") use,[9] basic tier rate administration,[10]

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[4] *See* Open Video System Agreement between The City of New York and RCN Telecom Services of New York, Inc. (entered into Dec. 23, 1997) ("OVS Agreement"); *see also* 47 U.S.C. § 573 (outlining procedures for the establishment of an open video system).

[5] *See Verizon FiOS comes to 32 Staten Island Communities*, tvover.net, *at* http://www.tvover.net/verizon+FiOS+Comes+To+32+Staten+Island+Communities.aspx (Sept. 29, 2005); *Verizon up to speed*, New York Daily News, *at* http://www.nydailynews.com/boroughs/v-pfriendly/story/328795p-281050c.html (July 17, 2005).

[6] In 2005, the New York Public Service Commission ("NYPSC") issued an order stating that Verizon's build-out of its fiber to the premises ("FTTP") system constituted an upgrade of its existing telecommunications network and, therefore, Verizon did not need to obtain a cable franchise prior to constructing these facilities, but only prior to its ultimate use of the facilities to provide video programming. *See Town of Babylon*, Case 05-M-0250 and Case 05-M-0247, 2005 WL 1403497 (rel. June 15, 2005) ("*Town of Babylon*").

[7] *NPRM* at ¶ 22.

[8] 47 U.S.C. § 552.

[9] 47 U.S.C. § 531(b) and (f); 47 U.S.C. § 541(a)(4)(B).

[10] 47 U.S.C. § 543.

institutional networks ("I-Net"),[11] and, in the renewal context, "cable related community needs and interests" generally.[12] In producing any final rules in this proceeding, the Commission must be very careful not to improperly import into Title VI of the Communications Act supposed limits on local authority derived from language in Title II that were never intended to apply to cable television service.

The City's second concern with the *NPRM*'s lack of clarity as to the need for cable franchising for entities holding other authority to occupy public streets[13] is that it may suggest a lack of sensitivity to important federal-law based distinctions among different types of authorizations. The City has two observations that may clarify this issue. The first observation is conceptual, and may perhaps best be explained with a metaphor. Movie theaters often charge, for good, market-economics reasons, a reduced price for a seat when the seat will be occupied by a child or a senior. It would be economically inefficient to allow a thirty-year-old adult to claim the right to rely on such an age-limited discount ticket to occupy a movie seat, even though this adult could argue that he is occupying the same one seat regardless of age and, therefore, is not "costing" the movie theater any more than if he was ten or eighty years old. Similarly, franchising authorities may have had many reasons to specify certain terms and conditions for the right to occupy street property based on a certain agreed-upon purpose for such occupancy. For example, a local government might have accepted lower compensation

[11] 47 U.S.C. § 531(b); 47 U.S.C. § 541(b)(3)(D).

[12] 47 U.S.C. § 546(a)(1)(A).

[13] Although the *NPRM* refers to authority to "use" public rights-of-way, the more accurate way of expressing what cable operators seek is not mere "use" but "occupancy" of public streets. *See, e.g., NPRM* at ¶ 22. Millions of people "use" New York City streets every day and the conditions imposed on such use are few. But "occupancy" of such streets, which is what cable operators seek, is necessarily quite limited and subject to important conditions.

than otherwise for occupancy of a street for certain services, and just those services, because such services are particularly desirable for the community and might not otherwise be self-supporting. For a beneficiary of such a discount to claim that the discount should also apply to other, perhaps more lucrative, services not contemplated or permitted in the original agreement because the physical occupancy is not changing would be taking the same position as the thirty-year-old who wants to use a child's discount theater ticket.

But even apart from this conceptual analysis, simply as a practical matter many of the features of a cable television franchise are, pursuant to the Cable Act itself, unique to franchises granted in contemplation of cable television service, including PEG channel requirements, and subscriber service standards such as required credits for outages, etc. There is no reason to think that these areas of concern, expressly recognized in the Cable Act as matters that may be reflected in local franchises, would be appropriately reflected in franchises granted for other types of services. The notion that franchises granted for provision of other services might be adequate for cable television purposes is thus wholly unpersuasive on its face, and if such an approach were incorporated into a Commission rule would be clearly *ultra vires*.

In short, the City emphasizes that the issues addressed in the cable franchising process are different from those addressed in other franchising or right-of-way grant proceedings. The cable franchising process is uniquely tailored to the provision of video programming service.

In reviewing local access to right-of-way procedures, it is important to note that the public rights of way belong to the community in much the same way that private

property belongs to private landowners. Just as private property owners seek to establish the terms under which others may occupy their property, so too local governments need an opportunity to delineate the way in which various entities occupy public property. For example, if any digging is to be done, the municipality may have requirements to ensure that this is done in a safe manner and standards to guarantee that the right-of-way is restored to proper working condition promptly.[14] Franchise agreements also require that cable operators are bonded to ensure that they can indemnify the City for any loss or damage to a municipal structure.[15] Thus, local governments need an opportunity to ensure that access to the rights of way for new video programming providers is granted in a way that maximizes the use of public property in a safe manner.

Just as in the case of private rental agreements, local governments have a right to recover fair and reasonable rent in a prompt manner from entities that occupy public property. (Indeed, local governments have a fiduciary responsibility vis a vis their local residents to manage public assets in the most efficient manner). Congress capped the amount of compensation cities can charge with respect to the operation of a cable system for cable service pursuant to section 622 of the Cable Act.[16] The City's franchise agreements establish a contractual obligation for the payment of franchise fees by the cable operators, and the right to audit the operators' books and records to ensure compliance with the cable operators' obligations.[17] Without the ability to audit and, thereby, enforce the fee collection right, this right becomes meaningless. The 5% of

[14] *See, e.g.,* Time Warner Agreement, Appendix B (setting out requirements the cable operator must follow in doing construction and laying cable lines); *see also* Time Warner Agreement § 6.6 (outlining procedures to ensure that existing City structures and landmarks are protected).

[15] *See, e.g.,* Time Warner Agreement, **§** 6.10.

[16] 47 U.S.C. **§** 542.

gross revenue standard, as "gross revenue" is currently defined in the Cable Act, along with the ability of local governments to audit the cable operators' books, has provided for a practicable form of compensation and a straightforward oversight mechanism with respect to cable services.

The City has found that the requirements for I-Nets, as well as PEG channels and/or support therefore, have been of tremendous value to City residents and should be retained going forward. The City's I-Net was established through the use of funds, fiber, and accessories provided by the City's cable and other franchises. (It is relatively easy for companies to set aside excess capacity, or provide links between buildings, when they themselves are deploying new facilities). The City has used its I-Net in many innovative ways that have brought expanded services to residents. For example, the City uses the I-Net for employee training, including first responder training, and for ensuring there are redundant communications capabilities for police, fire, and first responder needs. When the tragic events of September 11, 2001 unfolded, the City government's networking infrastructure was hit severely. The City's highly resilient I-Net, however, was able to function in many important capacities, even though one of the I-Net's core locations was knocked out by a fiber cut and power outages. The resiliency offered by this type of network is critical in times of emergency.

The City's franchise agreements also require cable operators to provide capacity for PEG access channels.[18] The public access channels offer borough specific information and local programming that might not otherwise be available on traditional

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[17] *See, e.g.*, Time Warner Agreement, § 10.5.

[18] The Commission tentatively concludes in the *NPRM* that "it is not unreasonable for an LFA, in awarding a franchise, to . . . 'require adequate assurance that the cable operator will provide adequate public, educational and governmental access channel capacity, facilities, or financial support.'" *See NPRM* at ¶ 20.

cable networks. The educational and governmental channels are used for, among other things, programming of the City University of New York, C-SPAN type coverage of City Council and other local government proceedings, live video feeds of traffic conditions at key locations, and foreign language programming serving otherwise underserved communities and foreign language students.

The consumer protection requirements[19] contained in the City's franchise agreements seek to ensure that residents receive a certain standard of service quality. The City, in its role as the franchising authority, also fields thousands of complaints and questions each year from City residents regarding their cable service. Local governments are best equipped to handle such tasks, given the wide variations in local needs and conditions. For example, in New York City the density of multiple dwellings can create service issues that may not arise in other locations.

Finally, the City's franchise agreements also contain universal service requirements,[20] which protect from discrimination based on income or other factors, to ensure that all residents within a franchise area have access to infrastructure supporting video programming services. Ultimately, local governments are in the best position to determine whether service is being provided, or build-out is being pursued, in an equitable manner in a given community.[21]

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[19] For instance the City's agreements require cable operators to provide bills in a comprehensible format (Cablevision Agreement, Appendix I, **§** 4.1), maintain records of repair requests (Cablevision Agreement, Appendix I, **§** 6.6), establish time periods for complaint resolution (Cablevision Agreement, Appendix I, **§** 7.4), and correction and repair of service outages and interruptions (Cablevision Agreement, Appendix I, **§** 6.2). In addition, the agreements establish remedies that the City can seek in the event that a cable company substantially fails to comply with a material customer service requirement (Cablevision Agreement, Appendix I, § 12.2).

[20] *See, e.g.*, Cablevision Agreement, § 3.2.01.

[21] Although the *NPRM* refers to the interest in assuring nondiscrimination with respect to different income levels, and this is of course an important value, the local interest in non-discrimination is not necessarily

III. "FAST MATCH" PROPOSAL

While it is vital that municipalities retain authority to oversee the uniquely local issues described above, the City, like most municipalities, is eager for greater competition in the video programming market. The Commission asks about specific rules, guidance, or best practices that it could adopt to facilitate rapid entry into the cable market.[22] To address the concerns raised by certain entities about the time associated with obtaining franchises and respond to the Commission's inquiries, the City suggests adoption of its "Fast Match" proposal. Before discussing its Fast Match proposal in detail, however, the City notes that, although the Commission has sought comment on its authority to establish franchising procedures, the City does not express a view at this time on the Commission's jurisdiction to adopt all elements of the Fast Match without additional legislative authority.[23] The City merely states that implementation of its Fast Match proposal, or something similar, by the Commission or Congress, would address the concerns of both local governments and new entrants to the MVPD market.

The primary goal of the Fast Match would be to preserve the municipalities' existing franchising authority to establish terms that cover issues unique to individual localities, while still enabling new entrants to provide service in as short a time as possible. Under the Fast Match proposal, a new entrant would be assured of a decision

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limited solely to economic status. Some residents may be left isolated from service for other reasons, including differences between single family homes and multiple dwellings or between areas where utilities run on poles above ground or must be buried underground. It can be an important role of local government to assure that utility infrastructure is widely available and that neighborhoods not be, for whatever reason, isolated by inaccessibility to infrastructure that is available elsewhere in the community. Are some areas of a community to be entitled to cable competition and others condemned to be left without, when it may be that a carefully structured local franchise could ensure access to cable competition for all? The priorities and tradeoffs related to such decisions can best be made at the local level based on local conditions.

[22] *See NPRM* at ¶ 21.

[23] *See NPRM* at ¶¶ 15-18.

on its franchise proposal within a set time period (i.e., a matter of months, not years) of the initial franchise application. A failure by the local franchising authority to act within the set time period would constitute, under section 621(a)(1) of the Cable Act, an unreasonable refusal to award an additional franchise.[24] To be eligible for this rapid review treatment, new entrants would have to agree to match the existing cable television franchise agreement (including the same termination date as contained in the existing agreement) subject to four specific variations from the existing agreement as outlined below. A denial of a proposal for a matching franchise would also constitute an unreasonable refusal under section 621(a)(1) of the Cable Act,[25] unless the franchise authority could show a basis for such refusal arising from the financial, legal and technical ability standard that has proven useful in section 626(c)(1)(C) of the Cable Act.[26]

Although in some cases, certain internal local procedures might need to be modified to accommodate a fixed time period for review of matching franchise proposals, such a review would be feasible in the case of the matching franchise proposal, because most of the review would focus on the relatively straightforward evaluation of the applicant's capability to be a franchisee, under the existing and familiar standard of section 626(c)(1)(C) of the Cable Act.[27] Certainly, in New York State, the Fast Match approach, coupled with the NYPSC's decision to permit Verizon to construct cable-compatible facilities without previously obtaining a franchise, would ensure that in New

[24] 47 U.S.C. § 541(a)(1).

[25] 47 U.S.C. § 541(a)(1).

[26] 47 U.S.C. §546(c)(1)(C).

[27] 47 U.S.C. § 546(c)(1)(C).

York franchises could be available to Verizon without any significant delay between completion of construction and operation, if Verizon begins the matching franchise application process while construction is underway.

Recognizing that new entrants are differently situated than incumbent service providers, the City proposes to allow the following four variations from the existing franchise agreement, while remaining eligible for the "Fast Match" accelerated franchise treatment. The first variation would be that in lieu of redundant capital investment requirements (such as requirements for a PEG studio, or I-Net cable, which would already have been built by an incumbent in most areas), the proposer could offer a liquidation of the obligation to its equivalent cash value. These payments would go towards the support, improvement, and expansion of PEG and I-Net facilities, in lieu of providing additional facilities that might be redundant.

The second variation would be that, in lieu of any fixed dollar payment obligations (such as a fixed dollar capital grant for PEG support) contained in existing agreements, new entrants could offer the equivalent on a per subscriber, per month basis. For example, if the incumbent cable operator with 100,000 subscribers had committed to making a $100,000 annual payment to be used for PEG operating expenses, this payment could be replaced by a commitment of one dollar per subscriber per year (or 8.5 cents per month). This approach has proven effective in the past in the City, allowing RCN to provide pockets of competition in the City under an existing open video system agreement without the burden of meeting large up-front capital commitments not supportable by its smaller subscriber base.[28]

[28] *See* OVS Agreement, at Supplement to Open Video System Agreement, § G.

The third variation would be that instead of a universal service *requirement*, there would be a financial *incentive* to reach universal service, with local communities receiving a set amount of additional funding, above the current 5% cap, until universal service is achieved. Part of the reason for doing this is based on the view that, by contributing monetarily, in a manner that reflects an initially smaller subscriber base, in lieu of contributing in-kind in the form of universal service, the new entrant is both returning to the community, in an appropriately scaled form, resources to offset the absence of more ubiquitous infrastructure and competing on a more level playing field.[29]

Finally, the City also recognizes that adopting the geographic boundaries contained in an existing franchise may not conform to a new MVPD's business plan. While the City is mindful of concerns about cherry picking,[30] the City also seeks to balance these concerns with the legitimate business needs of new entrants. Thus, the City proposes that, for those new entrants who agree to match all of the terms in an agreement, other than the three variations described above, the franchising authority would have 90 days in addition to the Fast Match time period to review the different geographic boundaries contained in the franchise application. The franchising authority would use this additional time to ensure that the new entrant's build-out and service deployment plans were consistent with the concept of universal service. Depending on the extent to which the new MVPD's application demonstrates a commitment to serve a range of

[29] It is worth noting that the City's current franchise agreements essentially divide the City into nine service areas. Consequently, any universal service type requirement, be it in the form of actual service or some type of payment, would still not be burdensome when compared to a build-out of the entire City.

[30] *See also NPRM* at ¶ 20 (stating "that it is not unreasonable for an LFA, in awarding a franchise, to 'assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.'").

different groups within a reasonable time period, the City might not need the full 90 days to rule on the application.[31]

With regard to the termination date of a matching franchise, the City believes that it is important to maintain the same termination date in the matching franchise as in the existing franchise, so that renewal procedures under section 626 of the Cable Act[32] can take place concurrently for both the matching franchise and the existing franchise. At the time of renewal, the City assesses the community's needs (e.g., in terms of consumer protection, technical standards, and PEG and I-Net), and then fashions the agreements accordingly, within the parameters established by the Cable Act. Given this renewal process, it would be problematic for the City to have different renewal dates for competing service providers without potentially ending up with different requirements imposed on competitors.

One alternative to exact matching termination dates might be to permit the inclusion in franchise proposals that would be eligible for "Fast Mach" treatment a provision pursuant to which the franchisee would have the option, at the time of a competitor's renewal, to avoid a renewal process of its own by agreeing to accept all the new requirements of a competitor's renewal franchise. This way a new entrant would not be limited to the remaining term of an existing franchise, unless once it sees the terms of the relevant renewal, it chooses to undergo its own renewal process rather than simply signing on to the new renewal terms.

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[31] In the case of this last variation, from franchise area boundaries, although the time frame for decision would still be assured under the Fast Match proposal, the other aspect of the City's proposal, in which local discretion to deny the proposal is limited to financial/legal/technical qualifications, would necessarily be expanded to also include review of the proposed revised boundaries.

[32] 47 U.S.C. § 546.

In any event, in those instances where it will simply not be possible for the new entrant to undertake all renewal steps in compliance with the deadlines contained in the existing franchise and federal law, the City proposes that a Fast Match procedure permit the rescheduling of those deadlines to a reasonable date after the commencement of the matching franchise.

IV. CONCLUSION

In conclusion, to the extent the Commission chooses to take any action to modify existing franchise procedures, such action should not undercut the municipalities' authority over uniquely local matters. The Commission should also be mindful of the regulatory scheme established by Congress, which envisions municipal participation in key local matters. Finally, the City would urge the Commission, in making any changes to the existing franchise procedures, to adopt the approach outlined in the City's Fast Match proposal.

Respectfully submitted,

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